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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 LEGACY PARTNERS, INC.,  
12  
13 vs. Plaintiff,  
14 CLARENDON AMERICAN INSURANCE  
15 COMPANY,  
Defendant.

CASE NO. 08CV920 BTM (CAB)  
ORDER DENYING MOTION TO  
DISMISS

16 Defendant Clarendon American Insurance Company moves to dismiss Plaintiff Legacy  
17 Partners, Inc.'s complaint for breach of insurance contract, breach of implied covenant of  
18 good faith and fair dealing, and declaratory relief. For the reasons set forth below, the Court  
19 DENIES Defendant's motion to dismiss.

20 **FACTUAL BACKGROUND**

21 Plaintiff purchased a general liability policy from Defendant which covered all losses  
22 suffered by Plaintiff as a result of an "Occurrence" as defined in the policy. The insurance  
23 policy in question defines Occurrence as "an accident, including continuous or repeated  
24 exposure to substantially the same general harmful conditions."

25 After the purchase of this policy, Plaintiff was sued by The Wellington Group, LLC  
26 ("Wellington"). Wellington alleged that Plaintiff, among others, (1) trespassed upon  
27 Wellington's property in order to make repairs to a retaining wall; (2) constructed  
28 subterranean tie-backs using Wellington's property without permission; (3) failed to exercise

1 reasonable care and skill in performing construction work on the Wellington property; (4)  
 2 failed to exercise reasonable care and skill in determining the need for repair to the retaining  
 3 wall; (5) caused damage by placement of heavy construction equipment and materials on  
 4 the Wellington property; and (6) negligently removed storm and pollution work that Wellington  
 5 had completed as part of its development of the property. (Wellington's Complaint ¶ ¶37,  
 6 117)

7 Plaintiff sought coverage for the loss it suffered as a result of the Wellington lawsuit  
 8 under the policy it purchased from Defendant. Defendant denied coverage.

### 9 DISCUSSION

10 A motion to dismiss for failure to state a claim will be denied unless it appears that "no  
 11 relief could be granted under any set of facts that could be proved consistent with the  
 12 allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Fidelity Financial Corp. v.  
 13 Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986).

14 The parties agree that in order for Plaintiff to be covered by the insurance policy  
 15 issued by Defendant, the loss sustained by Plaintiff as a result of the Wellington lawsuit must  
 16 have stemmed from an "occurrence," i.e., "an accident, including continuous or repeated  
 17 exposure to substantially the same general harmful conditions." Defendant argues that  
 18 because Plaintiff's actions with regard to the Wellington property were intentional rather than  
 19 accidental, they do not qualify as "occurrences" eligible for coverage under the insurance  
 20 policy.

21 Defendants point out that although Wellington alleges negligence against Plaintiffs,  
 22 a negligent action is not the equivalent of an accident.

23 It is common to hear the argument that if the underlying complaint alleges negligence,  
 24 there must be a duty to defend. This is not necessarily true. . . . Such arguments  
 25 misconstrue the 'accident' requirement in standard general liability policies. 'Under  
 26 California law, the term refers to the nature of the insured's conduct, not his state of  
 mind.' . . . 'Negligent' or not, in this case the insured's conduct alleged to have given  
 rise to claimant's injuries is necessarily nonaccidental, not because any 'harm' was  
 intended, but simply because the conduct could not be engaged in by 'accident.' "

27 Ulrich v. State Farm Fire & Cas. Co., 109 Cal. App. 4<sup>th</sup> 598, 610 (2003) (quoting Quan v.  
 28 Truck Ins. Exchange, 67 Cal. App. 4<sup>th</sup> 583, 595-596 (1998).

1 However, the term "accident" has also been used to refer to the unintended or  
 2 unexpected consequence of the act. "When an injury is an unexpected or unintended  
 3 consequence of the insured's conduct, it may be characterized as an accident for  
 4 which coverage exists. When the injury suffered is expected or intended, coverage  
 5 is denied. When one expects or intends an injury to occur, there is no 'accident.'"  
 6 . . . "The fact that an act which causes an injury is intentional does not take the  
 7 consequence of that act outside the coverage of a policy which excludes damage  
 8 unless caused by accident for if the consequence that is the damage or injury is not  
 9 intentional and is unexpected it is accidental in character. . . . the Supreme Court  
 10 stated that "accident" "has been defined 'as "a casualty-something out of the usual  
 11 course of events and which happens suddenly and unexpectedly and without design  
 12 of the person injured. It includes any event which takes place without the foresight or  
 13 expectation of the person acted upon or affected by the event.' . . . These statements  
 14 defining the term "accident" employ the words "consequence" and "happen," thereby  
 15 indicating that an accident can exist when either the cause is unintended or the effect  
 16 is unanticipated.

17 State Farm Fire and Cas. Co. v. Superior Court, 164 Cal. App. 4<sup>th</sup> 317, 325-26 (2008)

18 (citations omitted).

19 The Court has examined Plaintiff's complaint and the Wellington Second Amended  
 20 Complaint in order to determine whether Plaintiff has pled that it suffered a loss that is  
 21 eligible for coverage under the policy. Plaintiff does not make any independent  
 22 characterizations of its conduct with regard to the Wellington property as accidents,  
 23 unintentional actions, intended actions with unintended or unexpected consequences, or  
 24 otherwise. Instead, Plaintiff incorporates and relies upon the allegations brought against  
 25 them by Wellington in their complaint and responses to interrogatories. (Plaintiff's Complaint  
 26 ¶¶ 15-17)

27 The Court agrees that many of Plaintiff's alleged actions, such as the trespass upon  
 28 Wellington property or the placement of subterranean tie-backs, appear to be intentional  
 actions with intended consequences, rather than accidents. However, other allegations such  
 as the damage caused by placement of heavy construction equipment and materials on the  
 Wellington property and the negligent removal of Wellington's storm and pollution work could  
 have an accidental component depending on the facts of the case. For example, Plaintiff's  
 intentional act of placing equipment on Wellington's property could have resulted in  
 unintended consequences if Plaintiff accidentally deployed the wrong or too heavy  
 equipment. Plaintiff's intentional act of performing repair work on the retaining wall could  
 have involved unintended consequences if Plaintiff's employees accidentally caused

1 damaged while in the course of performing the intended repair. Also, the Court cannot tell  
2 from the pleadings whether the removal of Wellington's storm and pollution work was an  
3 intended consequence or the accidental byproduct of Plaintiff's repairs to the retaining wall.  
4 As explained above, it is unclear from Plaintiff's current complaint and the incorporated  
5 Wellington complaint whether the damage to the Wellington property was solely caused by  
6 the intended consequences of Plaintiff's actions or was also caused by the unintentional or  
7 accidental consequences of Plaintiff's actions. Because the Court cannot conclude at this  
8 juncture that Plaintiff's actions could not constitute "occurrences" under any set of facts  
9 consistent with the allegations as pled, the Court denies Defendant's motion to dismiss  
10 Plaintiff's first and second claims for breach of insurance contract.<sup>1</sup> See Hishon, 467 U.S.  
11 at 73.

12 Defendant also argues that the Court should also dismiss Plaintiff's third claim for  
13 tortious breach of the implied covenant of good faith and fair dealing because (1) Plaintiff has  
14 failed to plead that Defendant breached the insurance contract; and (2) Plaintiff failed to  
15 plead how the Defendant's handling of coverage was unreasonable. For the reasons set  
16 forth above, the Court finds that Plaintiff has not failed to plead that Defendant breached the  
17 insurance contract. The Court also finds that Plaintiff adequately pled a cause of action for  
18 breach of the implied covenant of good faith and fair dealing. Plaintiff states in its complaint  
19 that Clarendon acted in bad faith by wrongfully and unreasonably declining coverage.  
20 Contrary to Defendant's argument, Plaintiff does not need to enumerate specific acts and  
21 allege why they are unreasonable. Under the liberal pleading standards for federal actions,  
22 Plaintiff's general allegations are sufficient to plead a claim for breach of the implied covenant  
23 of good faith and fair dealing. See Love v. Fire Ins. Exchange, 221 Cal. App. 3d 1136, 1151-  
24 52 ("[T]here are at least two separate requirements to establish breach of the implied  
25 covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for

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27 <sup>1</sup> Because the Court denies the motion to dismiss on the ground that Plaintiff's  
28 loss was not result of an accidental "Occurrence," the Court need not reach the issue of  
whether coverage may also be available under the personal injury provisions of the  
insurance policy. The Court also declines to resolve Plaintiff's waiver and estoppel  
arguments as unnecessary.

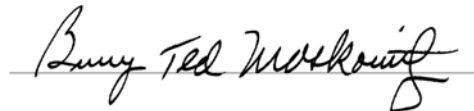
1 withholding benefits must have been unreasonable or without proper cause.”).

2 The Court therefore DENIES Defendant’s motion to dismiss Plaintiff’s third claim for  
3 tortious breach of the implied covenant of good faith and fair dealing. For the same reasons,  
4 the Court also denies Defendant’s motion to dismiss Plaintiff’s fourth and fifth causes of  
5 action for declaratory relief which are premised on the facts alleged in the first through third  
6 causes of action.

7 Defendant’s motion to dismiss is DENIED.

8 IT IS SO ORDERED.

9 DATED: October 2, 2008

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11 Honorable Barry Ted Moskowitz  
12 United States District Judge  
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